IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
	)	
vs.	)	Criminal No. 15-201
	)	Judge Nora Barry Fischer
STEVEN R. LAWNICZAK,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Presently before the Court is a contested restitution claim submitted by Carol L. Hepburn, Esquire on behalf of "Violet" seeking compensation from Defendant Steven R. Lawniczak under 18 U.S.C. § 2259 after he pled guilty to one count of possession of child pornography. (Docket Nos. 45, 48, 49, 51, 52). Defendant objects to the Probation Office's assessment of a $10,000.00 restitution order to "Violet" arguing that his criminal conduct did not proximately cause any of her losses. (Docket No. 45, 51). The Government maintains that it has established that Defendant proximately caused losses to "Violet" and that the Court should award her restitution in the amount of $7,009.00. (Docket No. 52). The parties' positions as to the restitution claim have been fully briefed and the Court held a restitution hearing on December 8, 2016, at which time the attorneys also presented oral argument. (Docket Nos. 45, 48, 49-52). The evidentiary record in support of the restitution request consists of all of the following: (1) testimony of FBI Special Agent Thomas Carter; (2) testimony of Ms. Hepburn; (3) an August 10, 2016 Letter from Ms. Hepburn; (4) a Forensic Psychological Examination of "Violet" by Randall Green, Ph.D. dated May 12, 2016; (5) Dr. Green's curricula vitae; (6) a declaration of Ms. Hepburn dated June 17, 2016; (7) a letter from Ms. Hepburn dated November 30, 2016; and, (8) a still photograph from the video depicting "Violet" at the time of the abuse. (Docket Nos. 48, 49, *Rest. Hr'g*

Trans. 12/8/16).[1] The Court also has the benefit of the files of record including the parties' plea agreement, the Indictment and the Presentence Investigation Report ("PIR"). *See Plea Agreement dated 6/1/16*; Docket Nos. 3, 33. After careful consideration of the evidence of record, and for the following reasons, the Court will sustain Defendant's objection to the restitution claim on behalf of "Violet."

By way of background, the grand jury returned a four-count Indictment against Defendant on September 16, 2015, charging him with two counts of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), for conduct occurring on January 28, 2014 and February 18, 2014, and two counts of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), for conduct occurring on March 4, 2014 and December 2, 2014. (Docket No. 3). Defendant has a prior child pornography conviction in the state of Texas from 2009 and for which he was sentenced to two years' imprisonment. (Docket No. 33 at ¶ 33). On July 21, 2016, Defendant pled guilty to one count of possession of material depicting the sexual exploitation of a minor on or about December 2, 2014, in violation of 18 U.S.C. § 2251(a)(4)(B), at Count Four of the Indictment. (Docket No. 29). The parties reached an 11(c)(1)(C) plea agreement in this case for a specific sentence of 120 months' incarceration, a term of supervised release of not less than 5 years, a special assessment of $100 and any fine to be determined by the Court. *See Plea Agreement dated 6/1/16*. The agreed-upon sentence is within the advisory guidelines range of 120-135 months' incarceration and at the mandatory minimum penalty of 120 months for the offense charged due to the prior conviction. (*See* Docket No. 41 at § II.1). Defendant also agreed to pay restitution to the victims of his offense and that "the Court shall determine the victims and/or other persons or parties who will receive restitution as authorized by law." *Plea Agreement dated 6/1/16* at ¶¶ C.2. The sentencing in this matter has been continued pending the Court's resolution of the outstanding restitution claim.

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[1] The Court notes that the parties declined to purchase the transcript. (Docket No. 50). Thus, the Court reaches this decision based on its notes of the proceeding and a rough draft of the transcript to which no more specific citations can be made.

It is well settled that restitution is mandatory for victims of child pornography offenses under 18 U.S.C. § 2259 for all covered losses[2] of a victim which are proximately caused by an offender. *See e.g.*, 18 U.S.C. § 2259(a); *Paroline v. United States*, --- U.S. ---, 134 S.Ct. 1710 (2014) (citing *Hughley v. United States*, 495 U.S. 411 (1990)). Indeed, this Court has awarded restitution in appropriate cases. *See e.g., United States v. Hardy*, 707 F. Supp. 2d 597 (W.D. Pa. Apr. 19, 2010). But, the statutory provisions dictate that an award of restitution is limited to victims of the offense of conviction and do not authorize an award of restitution for uncharged conduct of a defendant. *See Paroline,* 134 S.Ct. at 1720 (citing *Hughley*, 495 U.S. at 416) ("a straightforward reading of § 2259(c) indicates that the term 'a crime' refers to the offense of conviction."); *see also* 18 U.S.C. § 2259(c) ("For purposes of this section, the term 'victim' means the individual harmed as a result of a commission of a crime under this chapter"). Hence, individuals depicted in child pornography possessed by a defendant in a manner that constitutes "relevant conduct" under the Sentencing Guidelines are not eligible for restitution. *See United States v. Longo*, Crim. No. 14-57, 2015 WL 251561, at *1 (W.D. Pa. Jan. 20, 2015) (denying restitution claim to individual depicted on child pornography discovery on computer system because defendant pled guilty to producing child pornography depicting a different victim); *see*

[2] Specifically, § 2259(b)(3) states the following:

> [A]ny costs incurred by the victim for—(A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense.

18 U.S.C. § 2259(b)(3).

also United States v. Delacruz, 2015 WL 9260606, at *1 (E.D. Cal. Dec. 18, 2015) (denying restitution to victims where evidence showed that defendant possessed child pornographic images of them discovered upon the forensic examination of computer but he pled guilty to distribution of child pornography months earlier). It is also the Government's burden to prove a victim's entitlement to restitution by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e).

In this Court's estimation, Defendant's objection to the restitution claim on behalf of "Violet" must be sustained because the evidence presented at the restitution hearing demonstrated that Defendant possessed the video depicting the sexual exploitation of "Violet" on his cell phone which Special Agent Carter seized from Defendant on July 7, 2015, at a time which was eight months after he committed the activity described at Count Four on December 2, 2014. *See Rest. Hr'g Trans. 12/8/16*. To this end, Special Agent Carter testified that a forensic examination of the cell phone, which he described as an older style "flip phone," was conducted after it was seized.[3] *Id.* This forensic examination resulted in the discovery of emails between Defendant and another individual to which the video labeled "At School" was attached. *Id.* Special Agent Carter described the one and a half to two minute long video as depicting "Violet's" father sexually abusing her at a time when she was between the ages of 4 and 8. *Id.* He also testified concerning the email communications, stating that the distributor emailed the video to Defendant along with a comment "quite a reaction." *Id.* Defendant then responded, remarking that "Yes. It's not her first time." *Id.* The dates and times of the emails were not introduced into the record but Special Agent Carter admitted that the forensic review revealed that the video was only viewed by Defendant on that one occasion. *Id.*

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[3] Information about the date of the examination was not provided at the hearing. However, the Rule 16.1 report filed with the Court states that the only "reports of relevant physical or mental examinations and scientific tests" produced in this matter was an FBI report dated August 19, 2015. (Docket No. 16 at ¶ 5).

Pertinent here, Special Agent Carter did not provide any testimony which shows an evidentiary link between Defendant's July 7, 2015 possession of the video on his cell phone and Count Four to which he pled guilty, charging him with possession of material depicting the sexual exploitation of a minor on or about December 2, 2014, in violation of 18 U.S.C. § 2252(a)(4)(B).[4] *Id.* The PIR, to which no objections were lodged by the parties, states that the evidence supporting the conviction at Count Four involved Defendant's possession of an "extensive collection of child pornography" on his Dropbox account, as of December 2, 2014. (Docket Nos. 33 at ¶ 12; 41 at 1). During an interview with agents on July 7, 2015, Defendant "admitted to viewing and sharing child pornography, [...] accessing the Internet for this purpose using a TracFone," and to exchanging child pornography with others over email. (Docket No. 33 at ¶ 13). Special Agent Carter's testimony focused on the examination of the phone and he did not testify about the cache of child pornography that Defendant maintained on his online, cloud-based Dropbox account or indicate that images or videos depicting the sexual abuse of "Violet" were found in that location as well. *Rest. Hr'g Trans. 12/8/16*. The Court understands that generally "'persons with an interest in child pornography tend to hoard their materials and retain them for a long time,'" *United States v. Coca*, No. 14-262, 2016 WL 7013037, at *5 (W.D. Pa. Dec. 1, 2016) (quoting *United States v. Vosburgh*, 602 F.3d 512, 528 (3d Cir. 2010)), but there is no evidentiary basis in the present record to support a finding that Defendant possessed this particular video eight months earlier on December 2, 2014.[5] The email exchanges were neither

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4 The Court notes that the parties' plea agreement contains only standard language that does not expand the scope of allowable restitution beyond the offense of conviction. *See Plea Agreement 6/1/16* at ¶¶ C.1(e), C.5; *cf. United States v. Moreno*, Crim. No. 10-117, 2016 WL 7178775, at *5-6, n.6 (W.D. Pa. Dec. 9, 2016) (noting plea agreement language that expands liability for restitution beyond the count of conviction).

5 The Court notes that Defendant has not been charged with the possession of child pornography on July 7, 2015. In this regard, Counts One and Two involve Defendant's distribution of child pornographic materials to an undercover agent via email on January 28, 2014 and February 18, 2014. (*See* Docket Nos. 3 at 1-2; 33 at ¶¶ 10-11).

introduced into evidence nor were the dates of same provided. Accordingly, absent additional information providing the necessary evidentiary link between the possession of the video to the count of conviction, the Court is constrained by § 2259(c) and applicable precedent, *see e.g.*, *Hughley*, *Paroline*, and must sustain Defendant's objection and deny the claim for restitution by "Violet."

In light of this ruling, the Court need not continue to resolve the parties' disputes surrounding: whether Defendant proximately caused the losses claimed on behalf of "Violet," who now knows that material depicting her abuse is on the Internet; the legal sufficiency of the loss information provided by Dr. Green, who opined, to a reasonable degree of medical certainty, that future mental health counseling and treatment costs for "Violet" resulting from the online distribution of this material were expected to range from $72,400.00 to $118,025.00; or the appropriate apportionment of such total losses to Defendant's criminal conduct in light of *Paroline* and its progeny. (*See* Docket Nos. 45, 48, 49, 51, 52). The Court also is not authorized to consider whether the attorney's fees incurred by "Violet's" mother – including those costs and fees attendant to Ms. Hepburn's appearance and testimony on "Violet's" behalf at the hearing on December 8, 2016 and preparation for same – are recoverable given the broad definition of "victim" set forth in § 2259(c)[6] and Third Circuit precedent analyzing the recovery of restitution

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Count Three charged Defendant with possession of child pornography on March 4, 2014 stemming from his possession of "hundreds of video and still photographs depicting the sexual exploitation of minors" on his Yahoo email account. (Docket Nos. 3 at 3; 33 at ¶ 12).

[6] To this end, § 2259(c) provides that:

> For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C.A. § 2259(c).

by parents of minor children. *See United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004) ("The District Court correctly concluded that the cheerleaders' parents are entitled to restitution under the MVRA. They incurred reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial. The restitution order will therefore be affirmed.").

The Court is mindful that it retains broad discretion under 18 U.S.C. § 3661 to consider uncharged conduct of Defendant for purposes of imposing a fair and appropriate sentence under 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Therefore, the Court will consider the information concerning "Violet" presented by Ms. Hepburn, Special Agent Carter and the Government when imposing Defendant's sentence in this case. Although "Violet" is not technically a victim of the offense of conviction and is not entitled to restitution, the Court credits Ms. Hepburn's testimony that she has knowledge of the distribution of these materials on the Internet. And, as such, "Violet" was certainly harmed by Defendant's conduct of possessing the video, viewing it and making comments to his distributor. *See Paroline*, 134 S.Ct. at 1726 (noting that it is "common" knowledge that a child victim in a pornography case "suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured."). Defendant's comments are most troubling to the Court as they denote his understanding that "Violet" had been repeatedly sexually abused as a very young child but at the same time encouraged further distribution of the video depicting her sexual abuse, causing her more harm than a typical passive user of such material. *See e.g.* *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) ("Consumers such as [defendant] who 'merely' or 'passively' receive or possess child pornography directly contribute to [a] continuing victimization."). With that said, after careful consideration of the section 3553(a) factors in this case, the Court is prepared to accept the parties' plea agreement and recommended sentence of 120 months' incarceration, a term of at least 5 years' supervised release and up to a life term and a special assessment of $100.00.

For these reasons, Defendant's objection to an order of restitution of $10,000.00 to "Violet" is sustained because the Government has not proved by a preponderance of the evidence that she is eligible for restitution in this matter. Such ruling is without prejudice to "Violet's" pursuit of restitution against Defendant in the event that he is charged with and convicted of an offense for which she is deemed a victim under the restitution statutes. *See Longo*, 2015 WL 251561, at *2. The Court will separately enter an order re-scheduling the sentencing hearing.

s/Nora Barry Fischer
Nora Barry Fischer
U.S. District Judge

Date: January 12, 2017

cc/ecf: All counsel of record.

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